RE LUA KIN SUAI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUIT NO: S2-24-158-1998]
26 OCTOBER 1998

SUCCESSION: *Administrators - Application to transfer property of deceased - Whether application was made in the interest of infant beneficiaries - Whether reasons were given for transfer - Whether consent of guardian ad litem was sufficient - Entitlement of husband to only one-third of wife's estate - Distribution Act 1958, s. 6(1)(e) - Transfer of more than one third - Whether benefit to infant beneficiaries should be explained - Whether there was an implied trust in favour of husband/administrator*

SUCCESSION: *Administrators - Infant beneficiaries - Appointment of guardian ad litem - Whether necessary - Probate and Administration Act 1959, s. 4(3)*

In this instance, the administrators of the estate of the deceased, ie, the husband and sister of the deceased concerned, applied to have two properties of the deceased transferred to the husband/administrator. The sister of the deceased was also the guardian *ad litem* of the infant beneficiaries under the said estate.

No reasons were given for the application of the said transfer except that the guardian *ad litem* had no objections. It was argued that the husband/administrator being the father of the infant beneficiaries, was also their guardian and as such, was holding the property of the infant beneficiaries as trustee under an implied trust.

Held:

[1] Before the court considers any application to divest the interest of the beneficiaries, the court must be satisfied that such an application is being made for the benefit of the infants. In this instance, no reason was given for the request to transfer the two properties to the husband/administrator.

[1a] The consent of the guardian *ad litem* must not be taken to be a mere rubber stamp of approval. Even the guardian *ad litem* must state, in her view, why such a transfer to the husband/administrator would benefit the infant beneficiaries.

[2] By virtue of s. 6(1)(e) of the Distribution Act 1958, the surviving spouse is only entitled to one third of the estate and the infant children the remaining two-thirds in equal shares. Both administrators had not

explained the benefit to be accrued to the infant beneficiaries as a result of this transfer.

[3] It would have been very clear to the court if a trust deed had been created and the conveyance to the husband/administrator sought on the basis that he was to hold the shares of the infant beneficiaries in trust for their benefit. In the absence of any averments in the affidavit on the application as it had been made, this court could not accept the fact that a trust was intended.

[4] The *Concise Law Dictionary (Latin)* defines guardian *ad litem* as a person appointed to defend an action or other proceedings on behalf of an infant or person under disability. There was no question of any infant having to defend any action in this case. Further, s. 4(3) of the Probate and Administration Act 1959, allows for the appointment of two personal representatives where an infant is involved. In this case, since there were already two administrators, the appointment of the guardian *ad litem* who was also one of the administrators, was superflous and redundant.

[Application dismissed.]

Case referred to:
Yap Yoke Luan & Ors v. Ong Wee Tok & Ors [1984] 1 MLJ 23 ***(refd)***

Legislation referred to:
Distribution Act 1958, s. 6(1)(e)
Probate and Administration Act 1959, ss. 4(3), 60(4)

Other source referred to:
Concise Law Dictionary (Latin), 5 edn

For the applicants - YS Lim; M/s Tee, Tan & Partners

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

One Law Lew Geok (f) died on 5 January 1997. She had assets. She left behind her husband, Lua Kin Suai, and four infant children. Letters of administration in respect of her estate were granted on 18 July 1997 and extracted on 15 December 1997. By an order of court dated 18 July 1997 one Law Ai Tai (f), the deceased's sister, was appointed the guardian *ad litem*

of the infant children. The administrators are the husband, Lua Kin Suai and Law Ai Tai. The declared assets of the deceased are as follows:

1. Kesemua 1/6 bahagian hartanah yang dipegang di bawah CT 25450, Lot 2050, Mukim Beranang, Daerah Ulu Langat	-	RM100,000.00
2. Kesemua hartanah yang dipegang di bawah H.S.(M) 15306, Pt 16933, Mukim Klang, Negeri Selangor	-	RM 55,000.00
3. Akaun Simpanan Tetap di Bank Simpanan Nasional (Akaun No. 1-0367645-2)	-	RM 5,088.75
4. Akaun Simpanan di Bank Simpanan Nasional (Akaun No. 5-4343905-6)	-	RM 509.90
5. Akaun Simpanan di Bank Simpanan Nasional (Akaun No. 5-4343907-2)	-	RM 627.57
6. Akaun Simpanan di Bank Simpanan Nasional (Akaun No. 5-8715208-1)	-	RM 138.79
		RM161,364.71

The Application

Both the administrators then applied to have assets nos. 1 and 2 to be transferred to the husband beneficiary.

Case For The Applicants

Although this application was by way of *ex parte*, I had directed Mr. Y.S. Lim of counsel for the applicants to address me as to the propriety of this application. I questioned whether the guardian *ad litem*, who had in fact consented to this application on behalf of the infants, could give such a consent in the light of the provisions of the Distribution Act 1958, namely s. 6(1)(e) which reads:

> 6. Succession to intestate estates.
>
> (1) After the commencement of this Act, if any person shall die intestate as to any property to which he is beneficially entitled for an interest which does not cease on his death, such property or the proceeds thereof after payment thereout of the expenses of due administration shall, subject to the provisions of section 4, be distributed in the manner or be held on the trusts mentioned in this section, namely -
>
> ...

(e) if an intestate dies leaving a spouse and issue but no parent or parents, the surviving spouse shall be entitled to one-third of the estate and the issue the remaining two-thirds;

I have perused the affidavit filed by the administrators in support of this application very carefully and I note that the applicants have given no reason at all for seeking the said transfer. The only fact mentioned is that the guardian *ad litem* has no objections.

Mr. Lim relied on s. 60(4) of the Probate and Administration Act 1959 which reads as follows:

(4) An administrator may not, without the previous permission of the Court -

(a) mortgage, charge or transfer by sale, gift, exchange or otherwise any immovable property situate in any State and for the time being vested in him; or

(b) lease any such property for a term exceeding five years.

I do not think that the Act relied on by the applicants is helpful. Section 60(4) of the Probate and Administration Act 1959 merely provides that before an administrator could mortgage, charge, transfer by sale, gift or exchange any immovable property or lease such property for a term exceeding five years, he must get the court's consent.

Before the court considers any application to divest the interest of beneficiaries, the court must be satisfied that such an application is being made for the benefit of the infants. In this case the court has not been told the reason for this request to transfer the two properties to the father. It may be that for the better administration or management of the trust properties it would be beneficial to transfer the said properties to the husband-beneficiary. It is my judgment that the consent of the guardian *ad litem* must not be taken to be a mere rubber stamp of approval. The question arises whether this court should be concerned with the propriety or otherwise of this application so long as the guardian *ad litem* has given her consent. It is my judgment that even the guardian *ad litem* must state why in her view such a transfer to the husband-beneficiary would benefit the infants.

In fact in *Yap Yoke Luan & Ors v Ong Wee Tok & Ors* [1984] 1 MLJ 23 FC Syed Agil Barakbah FJ said at p. 25,

> ... The duty of the Court is to protect the rights of the beneficiaries and not to consider the interests of the proposed purchasers. In exercising its discretion the Court will have to look into the facts and surrounding circumstances of

the case i.e. whether the proposed sale was favourable to the beneficiaries and whether the administrators had acted with proper prudence in exercising their overriding duty to obtain the best possible price.

As I had said earlier no facts have been presented to me, to enable me to properly exercise my discretion in favour of the applicants.

In law pursuant to the Distribution Act 1958 the surviving spouse, namely the husband in this case, is only entitled to one third of the estate and the infant children no doubt in equal shares the remaining two-thirds. Neither the husband-beneficiary nor the administrator has explained the benefit to be accrued to the infants as a result of this transfer.

Finally Mr. Lim argued that the first administrator being the father, is also a guardian for the infants. A guardian, holding the property of the infant, is a trustee holding the property under an implied trust for the infants. Relying on the Guardianship of Infants Act 1961 learned counsel argued that an implied trust was created as soon as the guardian comes into possession of property belonging to an infant.

To my mind Mr. Lim's submission is clearly in conflict with the application which seeks a transfer of the said properties to the father in his personal capacity. It would have been very clear to the court if a trust deed had been created and the conveyance to the father sought on the basis that he was to hold the shares of the infants in trust for their benefit. In the absence of any averments in the affidavit, I cannot, on the application as it has been made, accept that a trust was intended.

In any case I am at a loss as to why a guardian *ad litem* has been appointed at all in this case. The *Concise Law Dictionary* (Latin) 5th Ed defines a guardian *ad litem* as a person appointed to defend an action or other proceedings on behalf of an infant or person under disability. There is no question of any infant having to defend any action in this case. I take the word "proceedings" to mean any action whereby an infant is called upon to act, to protect himself in respect of any matter. In fact s. 4(3) of the Probate and Administration Act 1959 which reads,

(3) If there is only one personal representative (not being a trust corporation) then, during the minority of a beneficiary or the subsistence of a life interest, and until the estate is fully administered, the Court may on the application of any person interested or of the guardian, committee or receiver of any such person, or of its own motion, appoint in accordance with rules of court one or more personal representatives in addition to the original personal representative.

clearly allows for the appointment of 2 personal representatives where an infant is involved. In this case, since there were already 2 administrators, the appointment of a guardian *ad litem* and more so since the same guardian *ad litem* was also one of the administrators, it is my judgment that the appointment of a guardian *ad litem* is superfluous and redundant.

In the circumstances, as the application now stands, it stands dismissed.